No. 08-486

Supreme Court, U.S.
FILED
NOV 14 2008
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In The

Supreme Court of the United States

STEPHEN A. MANN,

Petitioner,

v.

MICHAEL HELMIG, Sheriff,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

Did the Sixth Circuit correctly affirm the District Court's grant of summary judgment in Respondent's favor on Petitioner's federal claims?

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COUNTERSTATEMENT OF THE CASE

Petitioner's Statement of the Case omits material facts that facilitate an understanding of the case. Following is a more thorough statement of the facts:

Petitioner, Stephen Mann, is a disabled veteran who suffers from post-traumatic stress disorder as a result of his military service in Vietnam. (R.33 S. Mann at TR 10-12, Apx. pp. 342-344) He lives on Idlewild Drive in unincorporated Boone County, Kentucky. (R.33 S. Mann at TR 6, Apx. p. 338)

In 1999, Petitioner had an altercation with his sister, Gladys Wagner, in which Petitioner told Wagner that she "and her bastard kids would never be allowed at my house again." (R.33 S. Mann at TR 35, Apx. p. 367) According to Petitioner, Wagner then falsely reported to an unidentified police agency in Kenton County that Petitioner had threatened to kill her and her children. (R.33 S. Mann at TR 35, Apx. p. 367) Based on that report, Wagner petitioned the Kenton District Court for a domestic violence order ("DVO") against Petitioner. (R.38 Helmig's MSJ at Exh. 1, Apx. p. 110-111) The Kenton District Court granted Wagner's petition, entering a DVO against Petitioner on December 1, 1999. The DVO indicated that "[Petitioner] is required to surrender [his] Kentucky license to carry concealed firearms or other deadly weapons to the court" and that "pursuant to 18 U.S.C. § 922(g), it is a federal violation to purchase, receive or possess a firearm while subject to this order." The DVO was scheduled to expire by its

terms on December 1, 2000. (R.38 Helmig's MSJ at Exh. 2, Apx. pp. 112-114)

In October 2000, at Wagner's request, the Kenton District Court extended the DVO through December 1, 2002. (R.38 Helmig's MSJ at Exh. 3, Apx. pp. 115-117)

In 2002, Wagner again petitioned the Kenton District Court to extend the DVO. At the same time, Petitioner moved that Court to lift the DVO's prohibition on firearms, apparently arguing that he and Wagner are not "intimate partners" within the meaning of 18 U.S.C. § 922(g). Having considered both requests, and having reviewed applicable federal statutes, the Kenton District Court issued an Opinion that it "may", depending on the relationship of the parties, be a violation of 18 U.S.C. § 922(g) to possess a firearm while subject to a DVO. In its Opinion, the Kenton District Court indicated that it "will issue a new order of protection incorporating the appropriate statement of the law." (R.38 Helmig's MSJ at Exh. 4, Apx. pp. 118-119) On the same date, the Kenton District Court entered an amended DVO that provided, "Pursuant to 18 U.S.C. Section 922(g)(8), it *may* be a federal violation to purchase, receive or possess a firearm or ammunition while subject to this Order." The amended DVO was to expire by its terms

on December 1, 2003.[1] (R.38 Helmig's MSJ at Exh. 5, Apx. pp. 120-122)

In November 2003, Wagner again petitioned for an extension of the DVO, and the Kenton District Court extended it through December 1, 2005 "subject to amendment on the court's own order." Again, the DVO indicated that, "Pursuant to 18 U.S.C Section 922(g)(8), it *may* be a federal violation to purchase, receive or possess a firearm or ammunition while subject to this Order." (R.38 Helmig's MSJ at Exh. 6, Apx. pp. 123-126)

On May 16, 2005, while the DVO was still in effect, the Boone County Sheriff's Department received a "shots fired" call and was informed that someone was shooting a firearm at Petitioner's house. (R.38 Helmig's MSJ at Exh. 7, Apx. pp. 127-129; R.32 C. Combs at TR 5, Apx. p. 233) A dispatcher sent Boone County Deputy Chris Combs to respond to the call. (R.32 C. Combs at TR 5, Apx. p. 233)

Deputy Combs pulled into Petitioner's driveway, got out of his cruiser and approached the front door of Petitioner's house. (R.33 S. Mann at TR 46, Apx.

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[1] According to allegations in a parallel action that Mann filed against a number of defendants (including Helmig), the Clerk for the Kenton District Court did not properly enter the terms of the amended DVO into the state-wide law enforcement database, such that law enforcement officers like Boone County Deputy Sheriff Chris Combs did not have accurate information about the terms of the amended DVO. *Mann v. Linn et al.*, E.D. Ky., Case No. 06-108.

p. 378) Petitioner opened the door and let Deputy Combs into his house. (R.33 S. Mann at TR 47, Apx. p. 379) Deputy Combs told Petitioner he had received a shots-fired call and asked if Petitioner had been the source of the gunfire. (R.33 S. Mann at TR 47, Apx. p. 379) Petitioner confirmed he had been "shooting a couple rounds" at a target in his backyard. (R.33 S. Mann at TR 48, Apx. p. 380) Petitioner then led Deputy Combs through his kitchen, out his back door and onto his porch, and showed him three rifles sitting on his picnic table. (R.33 S. Mann at TR 44, 48-49, Apx. pp. 380-381) Deputy Combs thanked Petitioner for his cooperation and left. (R.33 S. Mann at TR 51, Apx. p. 383)

When he returned to his cruiser, Deputy Combs had a message on his cruiser's mobile computer that the person who had made the shots-fired call wanted to talk with him. (R.32 C. Combs at TR 9, Apx. p. 237) Deputy Combs pulled his cruiser out of Petitioner's driveway and into the driveway of the neighboring property, which was owned by Petitioner's brother, Mark Mann. (R.32 C. Combs at TR 9, Apx. p. 237) Upon exiting his cruiser, Deputy Combs was approached by Mark Mann's wife and another woman. (R.32 C. Combs at TR 10, Apx. p. 238) After Deputy Combs explained that it was not illegal for Petitioner to discharge his guns in his own back yard in that part of the county, the women told Deputy Combs that Petitioner was subject to a DVO. (R.32 C. Combs at TR 10-11, Apx. p. 238-239)

Deputy Combs returned to Petitioner's property to discuss the DVO with him. (R.32 C. Combs at TR 12, Apx. p. 240; R.33 S. Mann at TR 52, Apx. p. 384) By then, Petitioner had returned to his back yard and resumed firing his rifles. (R.33 S. Mann at TR 51, Apx. p. 383) According to Petitioner, Deputy Combs walked through the side yard of Petitioner's property, assuming a "modified crouched police stance with his hand on his weapon . . . demanding I drop my gun." (R.33 S. Mann at TR 52-53, Apx. pp. 384-385) Petitioner unloaded his weapon and placed it on the picnic table. (R.33 S. Mann at TR 57, Apx. p. 389) Deputy Combs then asked Petitioner if there was a DVO against him. (R.33 S. Mann at TR 57, Apx. p. 389) Petitioner acknowledged there was, and led Deputy Combs into his house to show him a copy of the DVO that was entered on December 1, 2003. (R.33 S. Mann at TR 57-58, Apx. pp. 389-390; R.38 Helmig's MSJ at Exh. 6, Apx. pp. 123-126) Petitioner claimed that the DVO did not preclude him from possessing guns. (R.33 S. Mann at TR 57-58, Apx. pp. 389-390)

Deputy Combs reviewed the DVO that Petitioner showed him, noting the language that said it "*may* be a federal violation to . . . possess a firearm or ammunition while subject to this order." Given such language, Deputy Combs was uncertain whether or not the DVO precluded Petitioner from possessing weapons. (R.32 C. Combs at TR 19-20, 23, Apx. pp. 247-248, 251) Petitioner provided Deputy Combs with the name and phone number of an attorney who had

represented Petitioner in connection with the DVO, and, with Petitioner's permission, Deputy Combs tried to no avail to reach the attorney for an explanation of the facts and circumstances that led to the entry of the DVO. (R.32 C. Combs at TR 17, 26, Apx. pp. 245, 254; R.33 S. Mann at TR 61, Apx. p. 393) Deputy Combs then tried to reach the Boone County Attorney's Office for direction, but was unable to reach anyone in that office. (R.32 C. Combs at TR 26, Apx. p. 254) Finally, Combs called the Commonwealth Attorney's Office and spoke with Assistant Commonwealth Attorney Jason Hiltz. (R.32 C. Combs at TR 26, Apx. p. 254) Hiltz advised Deputy Combs that Petitioner was not permitted to possess firearms *if* he was subject to an active DVO, but gave no further instruction. (R.32 C. Combs at TR 27, Apx. p. 255)

Deputy Combs then decided to transport Petitioner's firearms to the Boone County Sheriff's Department for "safekeeping" until the relevant facts regarding the DVO could be ascertained. (R.38 Helmig's MSJ at Exh. 8, Apx. pp. 130-131) He secured the three rifles that Petitioner had been firing. Petitioner also volunteered that he had three other firearms in the house, and told Deputy Combs where to find those. (R.33 S. Mann at TR 66-67, Apx. pp. 398-399) Deputy Combs located and secured those three firearms and a box of ammunition, gave Petitioner a receipt for all six weapons, and entered the weapons in the property room of the Boone County Sheriff's Department for safekeeping. (R.38 Helmig's MSJ at Exh. 8 and 9, Apx. pp. 130-132)

On multiple occasions since that time, both before and after this action was filed, Petitioner was made aware that the firearms could be retrieved from the Property Room at the Boone County Sheriff's Department, but Petitioner refused to retrieve them. Rather, Petitioner insisted that Boone County Sheriff Michael Helmig personally deliver the firearms to his home. In fact, Petitioner testified that he filed this action simply because Helmig – who was not even aware that Petitioner's firearms had been transported to the Sheriff's Department for safekeeping until *after* this action was filed – did not do so. (R.33 S. Mann at TR 79, 83-84, 86-87, Apx. pp. 411, 415-416, 418-419; R.29 M. Helmig at TR 11-12, Apx. pp. 290-291; R.38 Helmig's MSJ at Exh. 9, Apx. p. 132)

PROCEEDINGS BELOW

Petitioner filed this action against Boone County Sheriff Helmig – in his official capacity only – on August 2, 2005. Pursuant to 42 U.S.C. § 1983, Petitioner sought to recover for the alleged violations of his federal constitutional rights under the Second, Fourth, Fifth and Fourteenth Amendments. (R.1 Complaint, Apx. pp. 9-13) He also asserted a state-law cause of action for conversion. (R.1 Complaint, Apx. pp. 9-13) Following an ample period of discovery, the parties filed cross-motions for summary judgment.

At approximately the same time, Petitioner moved the District Court for leave to amend his Complaint for the purpose of naming additional defendants. (R.25 Motion for Leave, Apx. pp. 19-25) Specifically, Petitioner sought for the first time to assert claims against Deputy Combs; Boone County Sheriff's Deputy Robert Duncan, who responded to the shots-fired complaint and was present for a portion of the interaction between Petitioner and Deputy Combs; and Assistant Commonwealth Attorney Jason Hiltz, whom Deputy Combs had called for legal advice during the encounter. (R.25 Motion for Leave, Apx. pp. 19-25) Noting the passage of the deadline for adding parties, the passage of the twice-extended discovery period, and the likelihood that claims asserted against the proposed defendants would be precluded by the statute of limitations, the District Court denied Petitioner's Motion to Amend his Complaint. (R.37 Order of 11/6/06, Apx. pp. 83-85)

Having resolved that issue, the District Court granted Sheriff Helmig's Motion for Summary Judgment and denied Petitioner's. (Petition Apx. p. B-9) The District Court observed that Petitioner filed his claims against Boone County Sheriff Helmig in his official capacity only, and that such claims could not succeed absent proof that the alleged constitutional violation was caused by an official governmental policy or custom. (Petition Apx. p. B-6) The District Court ruled that Petitioner's federal claims could not succeed because he had not shown that the alleged violations of his constitutional rights were

undertaken pursuant to a policy or custom of Boone County. (Petition Apx. p. B-7) In so doing, the District Court rejected Petitioner's claim that Assistant Commonwealth Attorney Hiltz's conversation with Deputy Combs constituted official county policy, because Hiltz was not a final policymaker for Boone County. (Petition Apx. p. B-7)

Having granted summary judgment in favor of Sheriff Helmig on Petitioner's federal claims, the District Court declined to exercise supplemental jurisdiction over Petitioner's state-law conversion claim and dismissed that claim without prejudice. (Petition Apx. p. B-8)

On April 26, 2008, Petitioner filed his Notice of Appeal with the Sixth Circuit. In a thorough and well-reasoned opinion, the Sixth Circuit affirmed the District Court's decision granting summary judgment to Sheriff Helmig. (Petition Apx. p. A-17) The Court held that Petitioner had not proved that Boone County maintained a policy that required its deputies to consult with local prosecutors when faced with difficult questions in their law enforcement duties. (Petition Apx. p. A-16) The Court further stated that even if such a policy did exist, Petitioner had not established that the asserted Boone County policy actually caused the alleged deprivation of his constitutional rights. (Petition Apx. p. A-15) Finally, the Court held that Assistant Commonwealth Attorney Hiltz was not acting as a policymaker for Boone

County when he spoke with Deputy Combs. (Petition Apx. p. A-17)

This Petition for Writ of Certiorari followed.

REASONS FOR DENYING THE PETITION

I. THIS CASE DOES NOT PRESENT A COMPELLING REASON TO JUSTIFY THE EXERCISE OF CERTIORARI.

The issue Petitioner has identified for review by this Court is hardly novel or unique. Specifically, Petitioner claims the lower courts erred in determining that Assistant Commonwealth Attorney Hiltz was not a policymaker for Boone County. (Petition p. 12-13; Petition Apx. p. A-17, B-7) Petitioner also asks this Court to define when and under what circumstances a person possesses final policymaking authority for the government, an issue Petitioner argues is currently "uncertain." (Petition, p. 29-30) A well-developed body of law, emanating from a long line of this Court's decisions, already governs that issue.

Contrary to Petitioner's suggestion, there is no uncertainty with respect to when and under what circumstances a person possesses final policymaking authority for the government. In fact, this Court has addressed that issue time and again in cases such as *Monell v. New York City Dep't of Social Services*, 436 U.S. 658 (1978); *Pembaur v. Cincinnati*, 475 U.S. 469 (1986); *St. Louis v. Propotnik*, 485 U.S. 112 (1988); *Jett v. Dallas Independent School Dist.*, 491

U.S. 701 (1989); *McMillan v. Monroe County, Alabama*, 520 U.S. 781 (1997). From this precedent and the lower courts' interpretation of it, a clear definition of the municipal policymaker emerges: A policymaker is one who is authorized to decide what a municipality's policy on a specific subject will be, and whose decisions in that regard are neither subject to review nor constrained by preexisting municipal policies. *Pembaur*, 485 U.S. at 481-485; *Propotnik*, 485 U.S. at 124-127. *See also Welch v. Ciampa*, 2008 U.S. App. LEXIS 20485 (1st Cir. Sept. 23, 2008); *Roe v. City of Waterbury*, 542 F.3d 31 (2nd Cir. 2008); *Shehee v. City of Wilmington*, 67 Fed. Appx. 692 (3rd Cir. 2003); *Lytle v. Doyle*, 326 F.3d 463 (4th Cir. 2003); *Bolton v. City of Dallas*, 541 F.3d 545 (5th Cir. 2008); *Monistere v. City of Memphis*, 115 Fed. Appx. 845 (6th Cir. 2004); *Killinger v. Johnson*, 389 F.3d 765 (7th Cir. 2004); *Ware v. Jackson County*, 150 F.3d 873 (8th Cir. 1998); *Lytle v. Carl*, 382 F.3d 978 (9th Cir. 2004); *Dempsey v. City of Baldwin*, 143 Fed. Appx. 976 (10th Cir. 2005); *Cooper v. Dillon*, 403 F.3d 1208 (11th Cir. 2005).

Though Petitioner contends there is a conflict among the Circuit Courts regarding the identification of policymakers, the Second and Eighth Circuit cases he cites fail to support his claim. (Petition, p. 29-30)

In the Second Circuit case, a municipal hospital fired its employee for questioning the misuse of the hospital's funds. *Rookard v. Health & Hosps. Corp.*, 710 F.2d 41 (2nd Cir. 1983). The Second Circuit concluded that the municipal hospital could be held

liable for the employee's termination because the official who terminated her was authorized to make final policy with respect to personnel, by virtue of his title and position at the hospital, and that official's decisions were not subject to review by upper management. *Id.* at 45-46.

The Eighth Circuit case is factually similar to *Rookard*. In the Eighth Circuit case, a municipal judge fired one employee and harassed another who had reported the judge's misconduct to law enforcement officials. *Williams v. Butler,* 863 F.2d 1398, 1399 (8th Cir. 1988). In the resulting § 1983 action, the Eighth Circuit ruled that the judge was a final policymaker for the municipality, given that the judge had been allowed to exercise *carte blanche* authority to control and supervise his employees over a course of years, without any intercession on the part of the municipality.

Rookard and *Williams* are fully consistent with each other and with this Court's precedent. In both cases, the Circuit Courts determined whether the officials in their respective cases were policymakers by examining the official's authority to make policy decisions with regard to a specific subject, and whether the official's decisions had been subject to review or constrained by preexisting municipal policies. Such reasoning is consistent with *Pembaur*, *Propotnik*, and other precedents of this Court.

Of course, in deciding the present case, the District Court concluded, and the Sixth Circuit ultimately agreed, that Assistant Commonwealth Attorney Hiltz was *not* a policymaker for Boone County. The fact that the courts reached a different decision in this case does not, however, render the decision inconsistent with *Rookard*, *Williams* or the precedent of this Court, as Petitioner would like this Court to believe. Here, the courts applied the same legal principles that govern the identification of a policymaker, but those principles applied to the very different facts of the case did not require the same conclusion. Unlike the officials in *Rookard* and *Williams*, Assistant Commonwealth Attorney Hiltz is not an employee of the government for which he is claimed to be a policymaker. Rather, Hiltz is an employee of the Commonwealth of Kentucky. As a result, he is not authorized by virtue of his title or position to make policy on behalf of Boone County. Moreover, unlike the facts in *Rookard* or *Williams*, there is no evidence in the present case that the Commonwealth Attorney's Office generally or Hiltz specifically made policy decisions with respect to the day-to-day activities of Boone County Sheriff's Deputies.

In short, there simply is no compelling reason to exercise certiorari in this case. The legal principles for the identification of municipal policymakers are clear, and they are consistently applied by the Circuit Courts of Appeal. Petitioner's contentions to the contrary are nothing more than a cleverly-couched

attempt to seek review of a lower court's application of well-established law to the facts of his case.

II. FURTHER REVIEW OF PETITIONER'S CLAIMS IS UNNECESSARY BECAUSE HILTZ DID NOT ACT AS A POLICY-MAKER WHEN HE PROVIDED ADVICE TO DEPUTY COMBS.

Not only is there no compelling reason to grant certiorari in this case, review of the case would not change the outcome. The District Court correctly concluded, and the Sixth Circuit correctly agreed, that Hiltz was not a policymaker for Boone County.

A. Sheriff Helmig Did Not Delegate Final Policymaking Authority to Assistant Commonwealth Attorney Hiltz.

It is well-established that a governmental official who has the authority to establish official policy in some respect or another may delegate his authority to a second official, who then becomes a "policymaker." *Pembaur*, 475 U.S. at 483. In *Pembaur*, Hamilton County Sheriff's Deputies contacted their supervisor, who was a policymaker for Hamilton County in the arena of law enforcement, to determine whether they could forcibly enter a doctor's office in order to serve capiases on the doctor's employees. *Id.* at 473. The deputies' supervisor told them to call an assistant Hamilton County Prosecutor and to follow the prosecutor's instructions. *Id.* at 472, 484. Consistent with

their supervisor's direction, the deputies called an assistant prosecutor, who directed the deputies to "go in and get" the witnesses. *Id.* at 473. Under those circumstances, this Court ruled that the deputies' supervisor delegated his policymaking authority to the prosecutor when he instructed the deputies to follow the instructions of the prosecutor. *Id.* at 485.

Relying on *Pembaur*, Petitioner asserts that Sheriff Helmig delegated his policymaking authority to Assistant Commonwealth Attorney Hiltz. (Petition p. 22) However, *Pembaur* and the present case are different in a pivotal respect. In *Pembaur*, a government official with policymaking authority – the deputies' supervisor – clearly and specifically delegated his policymaking authority to the prosecutor when he instructed the deputies to call the prosecutor and to follow the prosecutor's orders. *See* 475 U.S. at 473.

In the present case, no such delegation ever occurred. Deputy Combs was never ordered by a supervisor to seek legal advice from Assistant Commonwealth Attorney Hiltz. Rather, Deputy Combs made a unilateral decision to contact the Commonwealth Attorney to seek advice with respect to a situation not otherwise addressed in the Boone County Sheriff's Department's policies and procedures. (R.32 C. Combs at TR 26, Apx. p. 254) Deputy Combs, who has no policymaking authority, cannot effectively delegate policymaking authority to other governmental officials.

The sole basis for Petitioner's contention that Sheriff Helmig delegated policymaking authority to Hiltz is a single, undeveloped statement from Sheriff Helmig's deposition testimony that "in general, when we're seeking legal advice from the County Attorney or the Commonwealth Attorney, we follow that advice." (Petition p. 21) Based on that testimony, Petitioner concludes that Boone County maintains a policy whereby a deputy who is uncertain how to proceed should contact the Commonwealth Attorney and follow whatever advice he receives. (Petition p. 22) Petitioner's conclusion is contrived extrapolation.

Essentially, Sheriff Helmig testified that he expects deputies to follow legal advice when they receive it. This, of course, is not the same as Helmig testifying that he has given deputies *carte blanche* authority to seek legal advice. Contrary to Petitioner's assertions, Helmig's testimony simply cannot be read as establishing that it is standard operating procedure in Boone County for deputies to call the Commonwealth or County Attorney for instruction on the appropriate law enforcement action to take "whenever" they are uncertain. Since delegation depends on proof that Helmig instructed his deputies to seek legal advice from a third party, Helmig's testimony does not support Petitioner's conclusion with respect to Boone County's policy.

Realizing the weakness of his own arguments, Petitioner contends that the Sixth Circuit's conclusion conflicts with its own prior decision in *Monistere v. City of Memphis*, 115 Fed. Appx. 845 (6th Cir.

2004). (Petition p. 23) In *Monistere*, the Memphis police department conducted an internal affairs investigation of two of its police officers after a citizen complained of their conduct during a traffic stop. *Id.* at 848. During the investigation, the officers were subjected to a strip search, allegedly without probable cause. *Id.* The officers filed suit, alleging that their constitutional rights had been violated. *Id.* On the issue of municipal liability, the city argued that it could not be held liable because it maintained no formal policies or procedures permitting an internal affairs investigator to require strip searches of those under investigation. *Id.* at 850. Consequently, the city claimed that the strip search was not undertaken pursuant to official policy. *Id.*

Notwithstanding the absence of a formal policy on that issue, the Sixth Circuit found the city liable because it had historically allowed internal affairs investigators to conduct their investigations without any defined parameters and with complete discretion to make decisions about the procedures to be used and the manner in which the investigations would be conducted. *Id.* at 851. By permitting the investigators such broad latitude in conducting investigations, the city had essentially delegated the authority to establish policy pertaining to investigations, thereby making the investigators final policymakers. *Id.*

The critical difference, however, between *Monistere* and the present case is that in *Monistere* the city had, over a course of years, engaged in a pattern and custom of allowing internal affairs investigators to

make such decisions. *Id.* In contrast, there is no such evidence in this case. Sheriff Helmig's testimony – which essentially indicated that he expects deputies to follow legal advice when they receive it – does not establish that he delegated to Hiltz the general power and authority to give legal advice to Helmig's deputies. There certainly is no evidence that any Boone County deputy has ever previously sought legal advice from Hiltz and no evidence that Sheriff Helmig ever told his deputies on this or any other occasion to seek legal advice from Hiltz. Simply put, the historical evidence that allowed the Sixth Circuit to conclude that the internal affairs investigators in *Monistere* had been delegated policymaking authority does not exist in this case.

Despite Petitioner's contentions, the record does not suggest that Hiltz was delegated authority to make final policy for Boone County – whether by a single order from Sheriff Helmig or by a custom or practice of permitting Hiltz to exercise this authority. Accordingly, the Court is not confronted with a unique factual situation which warrants review as to whether a delegation of policymaking authority occurred.

B. Assuming *Arguendo* that Hiltz Had Policymaking Authority, His Statement to Deputy Combs That "If He Has an Active DVO – Active DVO on Him Right Now, He Is Not to Possess Any Firearms" Was Not the Creation of Official Policy With Respect to the Appropriate Law Enforcement Action.

Even if Assistant Commonwealth Attorney Hiltz had the authority to make final policy on behalf of Boone County, he did not exercise such authority in this case. Petitioner argues that Hiltz established policy when he "advised Deputy Combs, albeit incorrectly, that because of the DVO Mann could not legally possess firearms." (Petition p. 20) This assertion, however, is a mischaracterization of the evidence.

Deputy Combs called Hiltz solely to ask for clarification when he realized the DVO at issue contained the ambiguous statement. Specifically, when Combs saw that the DVO stated that "Pursuant to 18 U.S.C. Section 922(g)(8), it *may* be a federal violation to purchase, receive or possess a firearm or ammunition while subject to this Order," he sought Hiltz's advice as to whether the DVO did or did not preclude Mann from possessing firearms. (R.32 Combs Dep. at TR 19-20, 23, 26-27, Apx. pp. 247-248, 251, 254-255)

In responding to Deputy Combs' inquiry, however, Hiltz did not give Combs any instruction on what action to take given the situation Combs faced.

Rather, Hiltz merely interpreted the DVO, telling Combs "if he has an active DVO – active DVO on him right now, he is not to possess any firearms." (R.32 Combs Dep. at TR 27, Apx. p. 255) Importantly, Hiltz did not "command" Combs to transport the firearms to the Boone County Sheriff's Department, to arrest Petitioner or otherwise order Combs to take any action.

At most, Hiltz acted as a "factfinder" and not a "policymaker" by assessing what he believed was intended by a DVO that had been issued by a court in a different county at the behest of a prosecutor other than himself. Hiltz did not determine the manner in which Deputy Combs should *respond* to the situation. In other words, Hiltz did not choose an appropriate course of action for Combs to follow from among various plausible alternatives. *See Pembaur,* 475 U.S. at 483 (citing *Oklahoma v. Tuttle*, 471 U.S. 808, 823 (1985)). Instead, he assessed the fixed realities of the situation (i.e. the language of the DVO) and drew a conclusion about what he believed that the DVO meant. Such action does not constitute "policymaking."

C. Petitioner's Remaining Allegations Are Insufficient to Hold Boone County Liable Under § 1983.

In his Petition, Petitioner has resurrected unsupported and irrelevant accusations that he last addressed at the District Court level. Specifically,

Petitioner revisits the issue whether Boone County may be held liable for the transportation of his firearms to the Sheriff's Department because Sheriff Helmig allegedly "condoned dishonesty" among his deputies. (Petition, p. 27)

Of course, that theory was and is premised on Petitioner's absurd assertion regarding the license plates on another deputy's personal vehicle. (Petition, p. 27) Petitioner claims that Deputy Brandon Markesberry – who was not involved in the underlying facts in any way – displays license plates on his personal vehicle that read "EXSEAL." Petitioner construes that license plate as a representation by Markesberry that Markesberry was a Navy Seal, and, since Petitioner does not believe that Markesberry ever was a Navy Seal, he concludes that Markesberry is dishonest. Even if Petitioner's assertions are true in every respect[2], the theory that Markesberry's dishonesty can result in Boone County's liability in this case is specious.

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[2] Petitioner's "proof" consists of a television news report that was, according to an unauthenticated transcript attached to a motion Petitioner filed with the District Court (Plaintiff's Motion for Summary Judgment, Exh. C), based on an anonymous source and the unverifiable hearsay statement of a website founder, the website no longer being in operation. The media outlet involved drew no conclusion either way, and in fact obtained records from the National Personnel Records Center – the official repository for military records – verifying that Markesberry had completed Seal training.

Finally, Petitioner contends Sheriff Helmig ratified Deputy Combs' decision to transport Petitioner's firearms to the Sheriff's Department. That contention, which Petitioner last raised with the District Court, is premised on the assertion that Sheriff Helmig did not investigate Petitioner's claim that his firearms had been illegally seized and did not discipline Deputy Combs in connection with the incident. (Petition, p. 26) Of course, municipal liability attaches only where "a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter." *Pembaur*, 475 U.S. at 483-484.

The fact that Sheriff Helmig did not conduct an investigation after hearing that Petitioner believed his firearms had been illegally seized does not support a ratification theory of municipal liability. After this incident occurred, the only issue raised by Petitioner's attorney was whether or not the DVO precluded Petitioner from possessing a firearm. (R.38 Helmig's MSJ Exh. 10) While Petitioner maintained that he was not precluded from possessing a firearm, it was not until this lawsuit was filed that Petitioner asserted the firearms were secured without his consent and, therefore, in violation of his rights. It was also not until this lawsuit was filed that Sheriff Helmig even became aware that the firearms were in his department's possession. (R.29 M. Helmig at TR 11-12) Once aware of the allegation, Helmig questioned Deputy Combs and believed that Deputy Combs had been truthful, had not violated

departmental policy, and had not engaged in inappropriate conduct. (R.29 M. Helmig at TR 30-31, 36-37) Of course, before this action was filed, Boone County Attorneys had already reviewed the issue whether the DVO precluded Plaintiff from possessing the firearms, determined it did not, and advised Plaintiff that he could retrieve his firearms at any time. (R.33 S. Mann at TR 79, 83-84, 86-87) These circumstances hardly connote a "deliberate choice" to approve of allegedly unlawful conduct.

Because review of the lower courts' decisions in this case would not alter the result, Petitioner's Writ of Certiorari must be denied.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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